Nos. 21-1326, 22-111

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
EX REL. TRACY SCHUTTE & MICHAEL YARBERRY,
Petitioners,
v.
SUPERVALU, INC., ET AL.,
Respondents.

UNITED STATES, EX REL. THOMAS PROCTOR,
Petitioner,
v.
SAFEWAY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* TAXPAYERS' FEDERATION OF ILLINOIS AND COUNCIL ON STATE TAXATION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS[1]

The Taxpayers' Federation of Illinois ("TFI") is a nonprofit, non-partisan state and local tax and fiscal policy advocacy organization. TFI was formed in 1940 to serve Illinois' citizens. TFI has been integrally involved in all major Illinois and fiscal policy discussions for over 75 years.

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today COST has grown to an independent membership of over 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities.

TFI and COST seek for state and local tax systems to provide certainty, effectiveness, and fairness, as well as be neutral and efficient. There are many instances, however, when the laws, or the laws as applied to the facts, are not clear. For a multi-state business, issues often arise as to whether state and local taxes violate the United States Constitution and federal statutes.

Sometimes taxpayers lack clear guidance as to when they are subject to state and local taxation. When the tax law as applied to the facts is subject to differing interpretations, amici submit that taxpayers should

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity aside from amici and their counsel funded its preparation or submission.

not be liable for treble damages, even if the tax is ultimately held due and owing.

As long-standing representatives of taxpayers, TFI and COST are uniquely positioned to provide this Court with context on why its interpretation of the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729 – 3733, impacts state false claims acts ("state FCAs") that apply to taxes and use similar terms. TFI and COST members have significant activities and operations in all 50 states and are directly impacted when this Court renders a decision because state courts will use it for guidance to determine if a state FCA action, including a state tax-related action, is subject to treble damages.

SUMMARY OF THE ARGUMENT

Certain states and municipalities have enacted their own false claims act, many of which are based on the FCA. Some of these state FCAs also apply to certain state or local taxes. In interpreting state FCAs, state courts often look to federal courts' interpretation of the FCA. Thus, this Court's decision will likely impact state FCA cases, including the imposition of treble damages for the violation of some of these states' tax laws.

Under the United States Code, federal tax matters are excluded from FCA actions. Illinois, in modeling its State FCA after the FCA, similarly excluded its state income taxes from its false claims act; however, it did not exclude other types of Illinois taxes. 740 ILCS 175/3(c). In various other states, a state FCA action can arise for all tax types, *e.g.,* New York and the District of Columbia. *See* N.Y. State Fin. Law § 189(4)(a); D.C. Code § 2-381.02(d).

In the context of multi-state and local taxes, a myriad of legal issues arise: Is the law clear? How does the law apply to the facts? Is there a violation of the United States Constitution or a state's constitution? Is there a violation of federal statutes or other state laws?

Amici submit that if there is an objectively reasonable interpretation of the proper application of the law to the facts, a defendant should not be found liable for a false claims act action because the requisite high degree of culpability is lacking. This Court should affirm the Seventh Circuit's decisions.

ARGUMENT

I. This Court's interpretation of the FCA has implications for state FCA cases, including those that involve state taxes.

A number of states, including Illinois, have adopted their own state FCA that is modeled after the federal FCA.[2] *See, e.g., State ex rel. Hurst v. Fanatics, Inc.*, 189 N.E.3d 498, 502 (Ill. App. Ct. 2021), appeal denied, 175 N.E.3d 140 (Ill. 2021) (addressing 740 ILCS 175/1 et seq.); *Int'l Game Technology, Inc. v. The Second Judicial Dist. Ct. of the State of Nevada*, 127 P.3d 1088, 1101 (Nev. 2006) (addressing Nev. Rev. Stat. § 357.010 et seq.).

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[2] A state FCA that includes a private right of enforcement has been enacted by nearly 30 states, as well as the District of Columbia. *See* Douglas W. Baruch & John T. Boese, Civil False Claims and Qui Tam Actions (Fifth Edition, 2023-1 Supp. 2020). Certain municipalities have also enacted a false claims act, including Chicago, New York City, and Philadelphia. *See* Chicago Muni. Code § 1-21-010 et seq.; N.Y.C. Admin. Code § 7-801 et seq.; Phila. Code § 19-3601 et seq.

The FCA provides an exclusion for federal taxes. The FCA states: "This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986." 31 USC § 3729(d). Some states, such as Illinois, enacted a false claims act that is modeled after the FCA and has a limited exclusion for income taxes, but does not exclude other types of Illinois taxes, such as sales, use, and transaction taxes.[3] Likewise, other state and municipal false claims act statutes and ordinances include all taxes or exclude some or all taxes.[4]

Given that Illinois' false claims act has an exclusion only for Illinois income taxes, in Illinois, relators have filed false claims act actions for other Illinois taxes, such as Illinois sales and use taxes. For example, relators have filed suits against out-of-state retailers on the basis that they knowingly failed to charge sales and use taxes on Internet sales.[5] *See, e.g., People ex rel.*

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[3] Illinois' FCA states: "This Section does not apply to claims, records, or statements made under the Illinois Income Tax Act." 740 ILCS 175/3(c).

[4] *See* D.C. Code § 2-381.02(d) (certain claims allowed for tax matters concerning District taxable income, District sales, or District revenue); Ind. Code § 5-11-5.5.2(a)(1) (income tax exclusion); Nev. Rev. Stat. § 357.020; *Int'l Game Technology, Inc.*, 127 P.3d at 1093 ("private plaintiffs may properly bring false claims actions based on tax deficiencies under some circumstances"); N.Y. State Fin. Law § 189(4)(a) (certain claims allowed for tax matters concerning net income or sales); R.I. Gen. Laws § 9-1.1-3(c) (personal income tax exclusion).

[5] In December 2018, a staff correspondent at Bloomberg noted the high volume of Illinois sales and use tax false claims act suits as filed by "a prolific whistleblower" Stephen B. Diamond. "Over the past 18 years, Diamond has filed more than 1,000 such cases in Cook County [Illinois] Circuit Court against retailers." Michael

Beeler, Schad and Diamond, P.C. v. Relax the Back Corp., 65 N.E.3d 503, 505, 511 (Ill. App. Ct. 2016) (affirming no state FCA liability for Internet sales because, among other things, "the law in this area is open to interpretation depending on the facts of each case"). These claims that a person made a material misrepresentation to avoid paying money owed the government are referred to as reverse false claims actions. *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1194 (10th Cir. 2006).

Illinois courts have relied on the federal courts' interpretation of the federal FCA for guidance in construing the Illinois' false claims act. *See People ex rel. Schad, Diamond and Shedden, P.C. v. QVC, Inc*., 31 N.E.3d 363, 371 (Ill. App. Ct. 2015). The Nevada Supreme Court has likewise stated that "[w]hen the Legislature adopts a statute substantially similar to a federal statute, 'a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts.'" *Int'l Game Technology, Inc*., 127 P.3d at 1103.[6] Thus, this Court's decision in the case at bar, while focused on a federal statute, will no doubt impact how various state courts will apply their state FCA, including those state FCA cases concerning state taxes.

J. Bologna, *Illinois AG Seeks to Dismiss Dozens of Whistleblower Cases*, Bloomberg Daily Tax Report (Dec. 24, 2020).

[6] The Nevada Supreme Court held that there was good cause for dismissing the case, as "state law entrusts the primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes to the expertise of Nevada's Department of Taxation." *Id*. at 1093. Nonetheless, the court also held that "private plaintiffs may properly bring false claims actions based on tax deficiencies under some circumstances." *Id*.

II. Summary judgment in favor of Defendants in a FCA action is proper when the Defendants have an objectively reasonable interpretation as to how the law applies to the facts. A high bar is needed before treble damages are awarded.

In the field of state and local taxes, it is not uncommon for persons to differ on how the laws apply in certain cases. Sometimes, the issue is a question of law, such as the United States Constitutional standard for when a remote seller has a "substantial nexus" with a state and, thus, whether the seller is required to collect and remit sales and use taxes. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2099 (2018) (overruling the physical presence rule). Other times, the issue is a question of how the laws apply to a specific set of facts. *See, e.g., Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 232-235 (1992) (addressing the state income tax immunity in the Interstate Commerce Tax Act, 15 U.S.C. §§ 381 – 384, Public Law 86-272, and whether the company's activities were requests for orders covered under the law or, alternatively, such activities were ancillary to requesting orders or *de minimus*).

When the tax laws are not clearly written, or the laws as applied to the facts are subject to conflicting interpretation, taxpayers may still be found liable for taxes assessed upon audit. But, when the tax at issue is not assessed by the government after audit but, instead, alleged due by a relator (*e.g.*, an invoice with no sales tax or less than what the relator expected), the potential exposure is heightened, given the possibility for treble damages – and the scienter element should be required similar to that affirmed by the Seventh Circuit.

In *SuperValu*, the Seventh Circuit affirmed the district court's grant of summary judgment in favor of the Defendants, finding no violation of the FCA. *United States ex rel. Schutte v. Supervalu Inc*., 9 F.4th 455, 472 (7th Cir. 2021). The district court held that "Relators cannot establish the FCA's knowing element as a matter of law…." *United States ex rel. Schutte v. Supervalu, Inc*., No. 3290, 2020 WL 3577996, *12 (C.D. Ill. July 1, 2020). The district court reasoned that "there was authority is [sic] support of both parties as to how price matching affected usual and customary price. However, there was no binding authority warning the Defendants away from their position." *Id*. at 11. The Seventh Circuit affirmed, reasoning that an objectively reasonable standard of scienter applies for establishing willful violations and, further, that while SuperValu's interpretation of the U&C price was erroneous, it was not unreasonable and no authoritative guidance placed SuperValu on notice of its error. *Supervalu Inc*., 9 F.4th at 472. Thus, the "knowingly" element for a false claims act action was lacking.[7] *Id*.

Likewise, in *Safeway*, the Seventh Circuit affirmed the district court's grant of summary judgment in favor of the Defendant that there was no FCA violation. *United States ex rel. Proctor v. Safeway, Inc*., 30 F.4th 649, 652, 663 (7th Cir. 2022). Again, the district court held that an objective scienter standard applies

[7] *Cf. Bartolotta v. Dunkin' Brands Group, Inc*., No: 1:2016cv04137, 2016 WL 7104290, *6, 9 (N.D. Ill. Dec. 6, 2016) (finding no violation of the Illinois' Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/2, when the state tax law is confusing and the defendants' interpretation of the law was not unreasonable.); *Lee v. Nationwide Cassel, L.P.*, 675 N.E.2d 599, 604 (Ill. 1996) (finding no violation of Illinois' Consumer Fraud and Deceptive Practices Act when there is "uncertainty about the applicable law.")

to the FCA. *United States ex rel. Proctor v. Safeway Inc*., No. 3225, 2020 WL 6694294, *1 (C.D. Ill. Nov. 13, 2020). During the periods at issue, "there was no authoritative guidance that warned Safeway away from what was an objectively reasonable position…." *Id*. As such, the Relator could not meet FCA's "knowingly" element as a matter of law. *Id*. The Seventh Circuit affirmed, reasoning that "[a] defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown." *United States ex rel. Proctor v. Safeway, Inc.,* 30 F.4th at 658 (quoting *Supervalu Inc.*, 9 F.4th at 468 (emphasis in original). Thus, given that Safeway's interpretation of the relevant law was objectively reasonable and no authoritative guidance warned the Defendant away from that interpretation, the Relators cannot show that SuperValu acted knowingly and, as such, the FCA scienter requirement is not met and precludes liability. *Id*. at 652-653, 658.

For tax matters, this Court affirming the Seventh Circuit's decision will help militate against taxpayers who are defending a state's FCA lawsuit from having treble damages imposed on them when a state tax law is ambiguous and there is no authoritative guidance.

Whether a FCA action or a state FCA action, a defendant should not be liable for treble damages under a false claims act when the law as applied to the facts is unclear, such as in the absence of any published authoritative guidance. This prevents a windfall to the relator when a high degree of certainty is lacking, such as when a judge finds the law, as applied to the facts, is subject to differing interpretations.

CONCLUSION

The decisions below should be affirmed. A false claims act action should not arise when the law as applied to the facts is unclear.

Respectfully submitted,

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